defendant was not actuated by spite or a desire to injure. Actual malice is not a necessary element of the liability. To do intentionally that which is calculated in the ordinary course of events to damage and which in fact does damage another person in his property or trade is malicious in law if done without justification or excuse, or in wanton disregard of the rights of others. And it is immaterial that defendant acted under a wrong understanding of his rights. *Bitterman* v. *Louisville, etc., R. Co.*, 207 U. S. 205, 12 Ann. Cas. 693; *Hitchman Co.* v. *Mitchell*, 245 U. S. 229, L. R. A. 1918C, 497. But see *Chambers* v. *Baldwin, supra.* Competition in business is not actionable, provided no unfair means are employed. *Lewis* v. *Huie-Hodge Lumber Co.*, 121 La. 658, 46 South. 685; *West Va. Transportation Co.* v. *Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804. But the defendant cannot maintain that he was acting to advance his own interests under the right of competition as a justification or excuse for inducing the breach of existing contracts. Nothing short of an equal or superior right will suffice. *Walker* v. *Cronin*, 107 Mass. 555. But see *Glenco Sand Co.* v. *Hudson Bros. Commission Co.*, 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804. Nor is the fact that the plaintiff has a right of action against the other party to the contract a defense. *Raymond* v. *Yarrington*, 96 Tex. 443, 73 S. W. 800, 97 Am. St. Rep. 914, 62 L. R. A. 962.

As to acts of interference by a third party whereby the plaintiff is prevented from making a contract, the criterion of liability is the existence or non-existence of a malicious motive. If the acts are prompted by a desire to advance his self-interest under the general right of competition in business, and no unlawful means are employed, no liability attaches to the defendant. *Roseneau* v. *Empire Circuit Co.*, 131 App. Div. 429, 115 N. Y. Supp. 511; *Robison* v. *Texas Pine Land Ass'n* (Tex. Civ. App.), 40 S. W. 843. But if unlawful means are employed the defendant will be held liable. See *Willner* v. *Silverman*, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895; *Van Horn* v. *Van Horn*, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184. If the acts of the defendant were done without justification or excuse, and not for the advancement of self-interest, but with the intention of injuring the plaintiff in his business by preventing him from obtaining the benefits of future contracts, an action for damages will lie. *Dunshee* v. *Standard Oil Co.* (Iowa), 126 N. W. 342. But see *Boyson* v. *Thorn, supra.*

HOMICIDE—INSANITY—BURDEN OF PROOF.—In a trial for murder the defendant pleaded insanity. *Held*, the burden was on the defendant to prove by a fair preponderance of evidence that he was insane when he killed the deceased. *Commonwealth* v. *Dale* (Pa.), 107 Atl. 743. See NOTES, p. 209.

INSURANCE—INCONTESTABLE CLAUSE—FRAUD AS A DEFENSE TO THE INSURER.—A life insurance policy provided that it would be incontestable from date of issue. In an action on the policy, the insurer set up the defense of fraud on the part of the insured in his application for the

policy. *Held*, this defense is not available. *MacKendree* v. *The Southern States Life Insurance Co.* (S. C.), 99 S. E. 806.

It is well settled that the language of the incontestable clause is intended to exclude fraud as a defense, unless fraud is excepted by the words of the clause. *Flanigan* v. *Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178; *Commercial Life Ins. Co.* v. *McGinnis*, 50 Ind. App. 630, 97 N. E. 1018. The question naturally arises as to how far the courts will let such a stipulation stand. In ordinary contracts there can be no valid agreement to waive the defense of fraud, because the agreement, being fraudulently obtained, is itself void. *Bridger* v. *Goldsmith*, 143 N. Y. 424, 38 N. E. 458. The courts will not allow a person making a fraudulent contract to exempt himself from the consequences of his fraud merely by inserting a provision to that effect in his contract. *Hofflin* v. *Moss* (C. C. A.), 67 Fed. 440. However, insurance contracts differ from ordinary contracts in that the insurance policy is drawn up by one party having unlimited time to decide on the terms, while the other party is not in such a favored position. And the insurer, in including the incontestable clause, holds out a strong inducement to the insured, so that the insured would be wronged if that inducement should prove to be a mere empty promise. See *Patterson* v. *Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980.

The cases must be divided into two groups: (1) those involving a clause making the policy incontestable after a fixed period from date, and (2) those involving a clause making the policy incontestable from date.

Fraud in the procurement renders a contract not void but merely voidable. *Wilson* v. *Hundley*, 96 Va. 96, 30 S. E. 492. Failure to avoid the contract within a reasonable time, during which the injured party, by the use of due diligence, could have discovered the fraud, amounts to affirmance. *Bostwick* v. *Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246. This raises two questions: (1) what is due diligence, and (2) what is a reasonable time. In order to effect a quick and certain settlement of these questions, the clause making a policy incontestable after a fixed date was devised. Thus, this clause has been upheld as being in the nature of a statute of limitations. *Drews* v. *Metropolitan Life Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167; *Commercial Life Ins. Co.* v. *McGinnis*, *supra*. Such a clause is clearly in accord with public policy in that it offers an incentive to the insurance company to be prompt and accurate in its investigations. *Wright* v. *Mutual Benefit Life Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749. Clearly, injustice is liable to result from allowing the insurer to set up the defense of fraud after the person best knowing the facts and best able to defend himself is dead. See *Clement* v. *New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 46 L. R. A. 247, 70 Am. St. Rep. 650. It seems that this clause should be upheld in those States which allow contracting parties to shorten the statute of limitations as affecting their contract, but not in other States. In the former, the clause has always been upheld. See *Clement* v. *New York Life Ins. Co.*, *supra*. However, one State at least, with seeming inconsistency, has upheld the incontesta-

ble clause, though forbidding the shortening of the statute of limitations. *Citizens' Life Ins. Co.* v. *McClure*, 138 Ky. 138, 127 S. W. 749. The great weight of authority holds that the clauses making a policy incontestable after a fixed period are valid. *Murray* v. *State Mutual Life Ins. Co.*, 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; *American Trust Company* v. *Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706; *Dibble* v. *Reliance Life Ins. Co.*, 170 Cal. 199, 149 Pac. 171.

The "incontestable from date" clause, on the other hand, presents the question whether the right to a defense on the ground of fraud can be absolutely contracted away. In *Union Central Life Ins. Co.* v. *Fox*, 106 Tenn. 347, 61 S. W. 62, the court, holding that this could be done, based its decision upon the theory that if a policy can be made incontestable after one year, it can be made incontestable after six months, and so on until it is made incontestable from date. It seems that this reasoning is unsound, since the chief reason for fixing a time after which the policy is to be incontestable is to encourage timely investigation by the insurer and to give the company a reasonable time in which to discover the facts. See *Weil* v. *Federal Life Ins. Co.*, 264 Ill. 425, 106 N. E. 246. A few cases follow the doctrine of *Union Central Life Ins. Co.* v. *Fox*, *supra*, in holding that the clause making the policy incontestable from date bars the defense of fraud. *Duvall* v. *National Ins. Co. of Montana*, 28 Idaho 356, 154 Pac. 632. See *National Annuity Ass'n* v. *Carter*, 96 Ark. 495, 132 S. W. 633. The decision in the instant case is in accord with this view. The opposite view is sustained by well reasoned cases. *Reagan* v. *Union Mutual Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217. See also *New York Life Ins. Co.* v. *Weaver's Adm'r*, 114 Ky. 295, 70 S. W. 628; *Welch* v. *Union Central Life Insurance Co.*, 108 Iowa 224, 78 N. W. 853.

MANDAMUS—WHO MAY SUE OUT WRIT OF—PRIVATE PERSON—ACTION FOR THE BENEFIT OF THE PUBLIC.—R. brought an action in his own name and right, not as a taxpayer, but as a resident and citizen of the State and as a patron of its common schools, on behalf of all citizens and all patrons and pupils of such schools, to obtain a writ of mandamus to compel the State Text-Book Commission to make a new adoption of text-books for use in the common schools of the State, in accordance with a statute making such an adoption mandatory. There was no statute in the State making it the duty of a public officer to bring an action to compel the recalcitrant commission to perform properly its duties. *Held*, since the duty of the Text-Book Commission was ministerial and did not affect the State in its sovereign capacity, but affected the public as a whole, and particularly those interested in the maintenance of the common schools of the State, that therefore the writ would lie on the application of the relator, although he could show no special interest in the proper performance of their duties by the Text-Book Commission. *State Text-Book Commission* v. *Weathers* (Ky.), 213 S. W. 207. See NOTES, p. 205.